Filed 6/16/09 Marlow v. MGE UPS Systems CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| DOROTHY MARLOW,<br>Plaintiff and Appellant,<br>v.<br>MGE UPS SYSTEMS, INC., et al.,<br>Defendants and Respondents. | G040262<br>(Super. Ct. No. 07CC05517)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Reversed.

Law Offices of Carlin & Buchsbaum, Gary R. Carlin, Brent S. Buchsbaum and Mitchel A. Brim, for Plaintiff and Appellant.

Littler Mendelson, Fermin H. Llaguno and Alaya B. Meyers, for Defendants and Respondents.

In litigation, we frequently characterize the arguments advanced by counsel, and the actions taken by counsel, as having been directly advanced or taken by the party that counsel represents. In this case, for example, we will recite in the statement of facts that appellant Dorothy Marlow filed "her" initial complaint in May of 2007. We will also discuss how "Marlow" responded to the arguments "made by" respondent MGE UPS Systems, Inc., in "its" successive demurrers.

However, this case provides an important reminder that while attorneys represent their clients in litigation, they are still *separate* from those clients. Miscommunications between parties and counsel can, and do, happen. More importantly, this case demonstrates rather alarmingly how quickly matters can get out of hand when it appears that *neither counsel* made any significant effort to address and resolve the factual inconsistency at the heart of Marlow's successive efforts to plead a cause of action. Here, this lapse in communication relates to the key *objective fact* which lies at the heart of the whole mess this case has become: i.e., whether Marlow *was still employed by MGE* when she filed her initial complaint. That seems like a fact about which MGE would have knowledge equal to Marlow's. Yet MGE's counsel purported to be irretrievably flummoxed by the inconsistency between Marlow's initial complaint, alleging she was still employed at MGE, and her first amended complaint, which alleged her employment had actually been *terminated* prior to the filing of that initial complaint.

Admittedly, those alleged facts are inconsistent on their face. But presumably MGE's counsel could easily have asked *his* client which version was accurate. If Marlow's employment had actually been terminated prior to the filing of the initial complaint, then MGE would presumably know that the initial complaint's allegation that she "continues to work" for it had simply been incorrect. And if Marlow's employment had not been terminated, then MGE would know that the first amended complaint's allegation of termination was untrue, and would presumably be subject to a motion for summary judgment.

But rather than acknowledging that truth, whatever it was, MGE (through its counsel) chose instead to focus on the *existence* of the inconsistency as a basis for repeated demurrers. And it worked. The trial court, presumably distracted by the dust kicked up by MGE's counsel, ultimately sustained the final demurrer without leave to amend, largely on the basis that *Marlow's counsel* had not clearly explained whether it had been two months after he filed the initial complaint, or four months after, *when he first realized* his client's employment had actually been terminated several months prior to that filing.

We reverse. The timing of counsel's realization that Marlow's employment had been terminated is not an element of her cause of action. It was relevant only as it pertained to the question of why he had alleged *in the initial complaint* that she was still employed by MGE. And regardless of whether he first learned of the termination two months after that initial complaint was filed, or four months after, it would satisfactorily explain why he did not include the allegation therein. Consequently, both the second and third amended complaints satisfactorily explained the inconsistency between the factual allegations of the initial and first amended complaints – it was attorney error, and probably an embarrassing one at that. There was consequently an insufficient basis for the court to infer that Marlow or her counsel had engaged in "sham pleading" as a means of avoiding demurrer, and thus it abused its discretion by, in essence, imposing a terminating sanction against Marlow for her counsel's sloppiness.[1]

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[1] MGE has moved to strike documents from Marlow's appendix on appeal, and to strike the portions of both her opening and reply briefs which discuss the content of those documents, on the basis that the documents in question were not filed with the trial court until after it had sustained MGE's demurrer without leave to amend. MGE asserts that our assessment of whether the trial court abused its discretion in denying leave to amend, we can consider only those arguments and documents presented to the court at the time it ruled. We disagree, and deny the motions.

As explained in *Wilkinson v. Zelen* (2008) 167 Cal.App.4th 37, 49, while the burden is on plaintiff to demonstrate how the defects in the complaint might be cured by amendment, "[a] plaintiff can make this showing *in the first instance to the appellate court*." (Italics added, citing *Lee v. Los Angeles County Metropolitan Transportation Authority* [(2003)] 107 Cal.App.4th [848] 854; and *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 321-322.) In fact, the trial court's denial of leave to amend may be upheld only where "the complaint shows on its face that it is incapable of amendment." (*Lee v. Los Angeles County Metropolitan Transportation Authority, supra,* 107 Cal.App.4th at p. 854, italics omitted.) Consequently, we are free to consider

## FACTS

The initial complaint in this action was filed in May of 2007. It alleged Marlow had been employed by MGE as an account manager since January of 2003, and "continues to work" in that capacity. It further alleged that in or about June of 2006, MGE had both "written [Marlow] up" for poor performance and threatened to fire her in retaliation for her protected request to take leave. The complaint also alleged, in a separate cause of action, that the retaliatory acts against Marlow had been prompted by age discrimination as well, and included causes of action for intentional and negligent infliction of emotional distress. The complaint was signed by Brent Buchsbaum, an attorney in the firm representing Marlow, but was not verified by Marlow.

MGE demurred to that complaint, asserting that neither "writing up" an employee nor threatening to fire her would qualify as an actionable "adverse employment action." In opposition to that demurrer, Marlow argued that such conduct was sufficient to constitute actionable conduct, as it rendered her effectively "unpromotable." She did not argue, in opposition to the demurrer, that her employment with MGE had already been terminated.

The court sustained the demurrer, and granted Marlow leave to amend each cause of action other than the cause of action alleging negligent infliction of emotional distress. That first amended complaint, filed in July of 2007, was not signed by

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Marlow's arguments in support of amendment, whether or not those arguments had been presented to the trial court at the time leave to amend was sought.

For her part, Marlow has requested that we take judicial notice of two documents contained in her appendix, both of which relate to her motion to vacate the judgment entered against her after the court sustained MGE's demurrer without leave to amend. According to MGE, those documents should not be considered, both because they were filed after the demurrer ruling at issue in this appeal, and because the motion to vacate was withdrawn before the trial court had the opportunity to rule upon it. We grant Marlow's request. As we have already noted, we are free to consider arguments in favor of amendment, even when made for the first time on appeal. The documents in question are thus relevant on appeal insofar as they evidence the circumstances surrounding the factual inconsistencies in Marlow's successive pleadings, and provide a basis for us to assess whether Marlow's complaint is capable of amendment.

Finally, Marlow has also moved to augment her appendix to include the disputed documents. As we have already concluded the documents are an appropriate subject of judicial notice, and, as they are currently included in the appendix, the motion is denied as moot.

Buchsbaum, but instead by Mitchel Brim, a different attorney from the same firm. It was also unverified. The first amended complaint addressed the deficiencies in the initial complaint by alleging, for the first time, that Marlow's employment with MGE had been "wrongfully terminated" back in January of 2007.

MGE again demurred, pointing out the obvious factual inconsistency between the original complaint, which had alleged Marlow was still in its employ, and the first amended complaint, which alleged that employment had actually been terminated prior to the filing of the original complaint. As MGE explained it, "[i]n her [original complaint, Marlow] alleged that she was a *current employee* of Defendant MGE UPS Systems, Inc. ("MGE") . . . . [¶] MGE filed a Demurrer to the Complaint on the grounds that [Marlow] had not stated an adverse employment action. In her Opposition to MGE's demurrer . . . [Marlow] *did not dispute* that she was still an employee of MGE and had never been terminated. . . . [¶] . . . [Marlow] now attempts to remedy the lack of an adverse employment action by claiming throughout the [first amended complaint] that she was *terminated* in January, 2007."

MGE also pointed out that Marlow had filed a form complaint with the Department of Fair Employment and Housing (DFEH) back in April of 2007, on which she checked the boxes stating she had been "harassed," "denied accommodation," "denied family or medical leave" and "retaliated against," but did not check the box stating she had been "fired."[2] MGE contended that the shifting nature of Marlow's

[2] The form in question is perhaps not a model of clarity. It includes a small area, approximately two inches high, in which the complainant is requested to specify the "particulars" of the claim, by checking off an array of boxes. Some of those boxes specify particular job actions which are objectively harmful to the employee, but not intrinsically wrongful (e.g., "fired, "demoted," "denied employment"), while others specify actions or categories of conduct which are intrinsically wrongful, but less specific in terms of impact on the employee (e.g., "harassed," "denied family or medical leave," "impermissible non-job related inquiry"). The form *does not* require the complainant to check all the boxes which apply to her claim. On her form, Marlow checked several boxes reflecting intrinsically wrongful conduct, and none of the boxes specifying particular adverse job actions. She also explained on another part of the form that she had been "retaliated against" for seeking family or medical leave, but did not specify anywhere on the form the nature of that "retaliation." The form does not reflect, one way or the other, whether Marlow remained in MGE's employ.

factual claims revealed this case to be "a futile waste of judicial resources that should not be permitted to stand."

The court sustained the second demurrer, based upon the inconsistent fact pleading regarding whether Marlow was still employed or had been fired. The court granted leave to amend, and directed Marlow's counsel to explain, within the allegations of the second amended complaint, the circumstances underlying that inconsistency.

Thus, Marlow's unverified second amended complaint was filed on October 10, 2007. It was also signed by Attorney Brim, and included new allegations explaining that "[i]n the original complaint, [Marlow's] counsel inadvertently mistakenly alleged that [Marlow] was still working as an account manager at the time of filing the original complaint. . . . [Marlow] did not verify the original complaint prior to [Marlow's] counsel filing the original complaint on or about May 2, 2007. It was not until in or about September of 2007, upon further investigation, that [Marlow's] counsel discovered this inadvertent mistake and was informed by [Marlow] that she was terminated in or about January of 2007."

On the same day Marlow's counsel filed her second amended complaint, he also filed a motion for leave to file a proposed third amended complaint. That proposed pleading mirrored the allegations of the second amended complaint and added new causes of action alleging (1) retaliation in response to "whistle-blowing;" and (2) failure to accommodate Marlow's disability. It also reflected that Marlow had filed an amended complaint for discrimination with the DFEH in August of 2007, in which she did check the boxes reflecting that she had been "fired," "laid off" and "denied employment" in January of 2007.

MGE again demurred to the second amended complaint, this time arguing that one of the factual allegations explaining why the termination of Marlow's employment had not been alleged in the original complaint was itself inconsistent with the first amended complaint. Specifically, MGE pointed out that while the first amended

complaint, which Marlow's counsel had filed in July of 2007, alleged that Marlow's employment had actually been terminated in January of 2007, the second amended complaint, in its attempt to explain the inconsistency between the first two complaints, alleged that Marlow's counsel had not learned of the employment termination *until September of 2007* – two months *after* he had signed and filed that first amended complaint. As MGE explained the problem: "The [second amended complaint], filed in October of 2007, alleges that [Marlow's] counsel became aware from their client in September, 2007, that she had been terminated. This new allegation directly flies in the face of the fact that the [first amended complaint], filed ***two months prior*** to September, 2007, alleges that [Marlow] was terminated."

Apparently, MGE's point was that Marlow's counsel was either (1) lying when he filed the first amended complaint in July, because he had alleged therein that Marlow's employment had been previously terminated by MGE, when (according to the second amended complaint) he had not yet learned that from Marlow; or (2) lying when he alleged in the second amended complaint that he had not discovered the termination *until September*, because he had apparently known it in July when he included that allegation in the first amended complaint.

The court heard the demurrer and the motion for leave to file the third amended complaint on the same date. The court's tentative ruling stated "[Marlow] has failed to even address the problem with the amended pleading, to wit, that it completely contradicts the allegations of the [first amended complaint]. Now there is a failure to address these allegations, or even attempt to explain these contradictions. [¶] It is clear that the explanation offered for the prior contradictory allegations ('working' vs. 'terminated') is inconsistent with the allegations and the filing of the [first amended complaint]. [¶] [Marlow] cannot simply omit the harmful prior allegations; this results in a sham pleading and is subject to demurrer. . . . Since this new allegation fails to explain the prior contradiction regarding the element of adverse employment action, and because

it, too, is contradictory to the preceding Complaint – Sustain [with] leave to amend as to [causes of actions] 1-3. [¶] . . . [¶] Ten (10) days leave to amend. [¶] . . . [Motion] For Leave to File [third amended complaint]: Grant. The proposed [third amended complaint] attached as [exhibit] A to the motion is deemed filed and served."

At the hearing, Marlow's counsel attempted to ask the court if it would "clarify for the record what exactly you're looking for in terms of – " but the court cut him off with a "no." The court then stated it was "not in the business of writing complaints for parties." The court went on to explain that "I tried to give you in the fairly lengthy tentative some idea of the concerns I had about the second amended complaint. *It really doesn't help at this point, because I granted your application for leave to file the third and it's filed. And so I don't see this as one of those, okay, now, I'm going to run back and redo the third amended complaint. It's done. It's in.* [¶] So, quite frankly, I will tell you my gut level reaction – this is without having reviewed at all the third amended complaint – is that *I'm expecting a demurrer to the third amended complaint*. We'll decide on that when it gets here, not before." The court adopted its tentative ruling as its decision.

As the court anticipated, MGE also demurred to the third amended complaint – which, having been prepared at the same time as the second amended complaint, and ordered filed on the same date the court had sustained the demurrer to that version, did nothing to address the most recent concerns expressed by the court. Not surprisingly then, the court once again sustained the demurrer. But this time, the court sustained without leave to amend.

As the court explained in its ruling: "This is the second time [Marlow] has ignored the argument that [Marlow's] attorney could not have discovered the facts of [Marlow's] termination in [September] of '07 if a [first amended complaint] alleging that same fact is filed two months earlier in July of '07. [¶] At this point [Marlow] still fails to explain adequately how the original Complaint alleged she was still employed in May

’07, while [her first amended complaint] alleges she was terminated in [January,] ’07, without explaining that inconsistency or the fact that her DFEH claim filed in April, ’07 does not state she was fired; and while her [second] and [third amended complaints] contend her attorney made a mistake and only discovered her firing in [September,] ’07 (but somehow alleged the fact of her firing two months earlier in the [first amended complaint]. [¶] Not only does [Marlow’s attorney] still fail to explain how he discovered the termination two months after he alleged it in the [first amended complaint], but there is inadequate explanation as to why [Marlow] did not include the fact of termination in her DFEH charges of [April,] ’07. Surely, this was not due to mistake of counsel.”

DISCUSSION

The principles which guide us on appeal are set forth in *Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1038-1039: “‘When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint’s properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action.’ (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) In making this determination, we are not bound by the trial court’s construction but instead make our own independent judgment as to the sufficiency of the complaint. (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 127.)”

Our Supreme Court has repeatedly made clear that if “there is a reasonable possibility that the defect can be cured by amendment,” it is an abuse of discretion to sustain a demurrer without leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081; *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

"However, when a complaint contains allegations that are fatal to a cause of action, a plaintiff cannot avoid those defects simply by filing an amended complaint that omits the problematic facts or pleads facts inconsistent with those alleged earlier. (*Hendy v. Losse*[, *supra*,] 54 Cal.3d 723; *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1109.) Absent an explanation for the inconsistency, a court will read the original defect into the amended complaint, rendering it vulnerable to demurrer again. (*Hendy v. Losse, supra*, at p. 743; *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384.)" (*Banis Restaurant Design, Inc. v. Serrano, supra*, 134 Cal.App.4th at p. 1044.) Thus, "[u]nder the sham pleading doctrine, allegations in an original pleading that rendered it vulnerable to demurrer or other attack cannot simply be omitted without explanation. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425-426.) The purpose of the doctrine is to enable the courts to prevent an abuse of process. (*Id*. at p. 426.)" (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751.)

Nonetheless, despite concerns about sham pleading, the Supreme Court has also long since "made it clear that 'a party should be allowed to correct a pleading by omitting an allegation which, it appears, was made as the result of mistake or inadvertence.'" (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 836; see also *Hahn v. Mirda, supra* 147 Cal.App.4th at p. 751 ["The [sham pleading] doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts."].)

Based upon the foregoing, the issue presented in this case is whether the trial court properly treated Marlow's about-face on what it referred to as the "'working' vs. 'terminated'" allegation as an instance of sham pleading, rather than merely a mistake by her counsel as alleged in the second (and third) amended complaints. We conclude it did not.

*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, addressed a similar situation. In that case, investors sued a pharmaceutical company, asserting securities

violations relating to its alleged concealment about the efficacy of "Esterom," a drug under development. In the first version of the complaint, plaintiffs alleged that "'[d]efendants withheld scientific and clinical knowledge that Esterom was not detected in the blood or urine of patients' and that '[w]hen Plaintiffs discovered that Entropin had omitted to disclose material information concerning the absorption of Esterom, Plaintiffs contacted counsel and began an investigation.'" (*Id*. at p. 423.) After defendant moved for summary judgment based upon the statute of limitations, citing the existence of publicly available information on its website regarding the outcome of the blood and urine tests, plaintiffs obtained leave to amend their complaint. In the amended complaint, plaintiffs alleged that the information disclosed on the website, while accurate, "did not provide plaintiffs or other investors with any reason to believe that Esterom was not absorbed or was not effective," and was thus insufficient to trigger the statute of limitations. (*Id*. at p. 417.)

The defendant in *Deveny* argued that plaintiffs' substantial change in theory of liability – from "you didn't tell us about the tests," to "okay, *you did tell us* about the tests, but you didn't explain their significance" – was an instance of sham pleading. The court disagreed. It noted that plaintiff's counsel, Rosen, had offered an explanation for the change; to wit, that he had initially been unaware of what information was publicly available, and that it was only after speaking with experts that he realized the data actually provided on defendant's website was simply insufficient to put potential investors on notice of the drug's problems. The court concluded this effort was sufficient to avoid the conclusion of sham pleading, noting "the sham pleading doctrine does not apply because Rosen offered *a plausible explanation* for the amendment, i.e., that he had erred in relying on the failure to disclose the blood and urine data as the basis for the complaint because further discovery and consultation with experts had shown that such data was inconclusive." (*Id*. at p. 426, italics added.)

The requirement that the explanation for inconsistency be merely "plausible" is consistent with the standard by which all pleadings are judged: i.e., that courts "'must assume the truth of the complaint's properly pleaded or implied factual allegations.' [Citation.]" (*Banis Restaurant Design, Inc. v. Serrano, supra*, 134 Cal.App.4th at p. 1038.) If Marlow's pleading alleges facts which plausibly explain the discrepancy between the allegations of her initial and first amended complaints, the court is obliged to assume they are true.

In this case, as in *Deveny*, Marlow's counsel offered a plausible explanation for his change in allegation – from one asserting Marlow was still employed by MGE to one asserting her employment had actually been terminated some months before. In the second and third amended complaints, which were filed at the same time, counsel alleged that the "continues to work" assertion in the initial complaint had been, quite simply, the product of attorney error. The attorney mistakenly believed Marlow remained employed when he filed the original complaint, and Marlow, who obviously knew whether she was still employed or not, had not been asked to verify that complaint, and thus had no occasion to correct it.

That explanation was plausible, while the alternatives were not. Essentially, Marlow's counsel appears to be acknowledging in the second and third amended complaints that the attorney who filed the initial complaint *failed to discuss with Marlow the specific circumstances of her employment prior to initiating the case.* That is, or certainly should be, a rather embarrassing admission. And while the idea of an attorney filing a complaint without ascertaining the key aspects of his client's claim is rather disturbing, it is nonetheless more plausible than concluding the attorney *did know* Marlow's employment had been terminated, but had intentionally lied about that fact in the initial complaint. If we could think of any possible strategic advantage to be gained by an attorney, who knew his client's employment had been terminated, nonetheless

alleging in a case of this nature that she was *still employed*, we might agree it looks suspicious, but we cannot.

Similarly, if we assume the attorney believed that Marlow was still working at MGE, as alleged in the initial complaint, we cannot imagine what might be gained by misrepresenting that her employment had actually been terminated in the first amended complaint. Even assuming an overzealous attorney might otherwise be inclined to "creatively portray" facts in an amended complaint as a means of bolstering his client's prospects in litigation, some facts can't be effectively faked. Allegations pertaining to *why* an employee was terminated might be fertile grounds for such shenanigans, but presumably, the defendant in an employment discrimination case – i.e., plaintiff's employer – is uniquely situated to know *if she is still working.* It's an objective fact which simply does not lend itself to effective manipulation.

So we are left to conclude that the only plausible explanation for the inconsistency between the initial complaint alleging Marlow was still employed by MGE, and the first amended complaint alleging her employment had been terminated, was exactly the one Marlow's counsel gave: "oops."

And the fact the second attorney to appear on Marlow's behalf (from the same firm) compounded the problem by alleging in the second amended (and simultaneously-filed third amended) complaint that he had not discovered the initial error until September of 2007, *two months after* he had personally signed the first amended complaint correcting that error, does not significantly alter the analysis.

The inconsistency between whether Marlow's counsel actually discovered that his client had been terminated in July of 2007, when he filed the first amended complaint, or in September of 2007, as alleged in the second amended complaint, is simply immaterial to the issue of why it was not alleged *in the initial complaint*. Both July and September of 2007 come after May of 2007, which is the month when the initial

complaint was filed. So either date of discovery sufficiently explains why counsel did not allege the termination as part of that initial complaint.

Of course, the attorney's error in ascertaining the status of his client's employment must be distinguished from a situation in which the client herself claims to have been confused about whether or not she was still employed. If the explanation in this case were that Marlow herself allegedly "forgot" she wasn't still working for MGE, that claim would be less plausible. But as we have previously pointed out, an attorney and his client are not actually one undivided entity. Generally, attorneys don't know everything their clients know about the circumstances relevant to a particular case. Sometimes the attorneys should know more than they do (as was apparently the case here), but it would be unreasonable to presume attorneys always perform as they should.

Consequently, the second amended complaint, despite the confusion about the date upon which Marlow's counsel's "discovered" she was no longer employed, does adequately explain the inconsistency between the factual allegations of the initial complaint and the first amended complaint – i.e., the first attorney made a mistake in the initial facts alleged. That explanation was plausible, and thus should have been accepted by the court.[3]

To be clear, the court's frustration with Marlow's counsel was understandable. But the court's impatience was less so. It gave Marlow *one* opportunity to amend her complaint to allege an actionable adverse employment action. She did so by subsequently alleging her employment had actually been terminated. It then gave her *one* chance to explain the discrepancy between that allegation and the conflicting

[3] At most, the court could have instructed Marlow's counsel to amend the complaint once more to correct the date of his alleged discovery of the erroneous allegation in the initial complaint. The court could also have instructed him to include allegations explaining *why* Marlow's initial DFEH complaint had not specified that she had been "fired." The court's concern with that latter issue was mentioned, for the first time, in its ruling which sustained the demurrer to the third amended complaint without leave to amend; it thus offered Marlow no meaningful opportunity to address that particular problem. As part of that third amended complaint, Marlow had incorporated an "amended" DFEH complaint, in which she had clearly checked off the "fired" box, alleging the termination had occurred in January of 2007, but offered no explanation of why she had not checked the box initially.

allegation which had been included in her initial complaint. She did so, when her attorney alleged – in both the second amended complaint and the proposed third amended complaint – that the discrepancy had been the product of attorney error in drafting the initial complaint, and that Marlow herself had not been asked to verify the factually incorrect pleading.

The court then *did not give* Marlow's counsel any opportunity to amend the complaint further, to explain the confusion about when he actually discovered the factual error in the initial complaint. While it is true, as MGE points out, that technically the court's ruling on the demurrer to the second amended complaint *did* give Marlow 10 days leave to amend, the court's comments at the hearing made clear that it was not allowing any such amendment. The court explained that since it had ordered the proposed third amended complaint to be filed that date, it was actually too late for Marlow to amend: "I granted your application for leave to file the third and it's filed. And so I don't see this as one of those, okay, now, I'm going to run back and redo the third amended complaint. It's done. It's in."

Moreover, the court flatly refused to give Marlow's counsel any guidance at the hearing on that demurrer as to how he might further amend the complaint to satisfy the court's concerns about perceived inconsistencies. The court's tentative ruling had simply stated that Marlow "has failed to even address the problem with the amended pleading, to wit, that it completely contradicts the allegations of the [first amended complaint]. . . . [T]here is a failure to address these allegations, or even attempt to explain these contradictions."

That statement was clearly incorrect, however, as the second amended complaint had explained the discrepancy as the product of attorney error. And when Marlow's counsel asked the court for a further explanation, it refused, stating that it was "not in the business of writing complaints for parties." While such a response might be appropriate in the majority of cases, since most demurrers address the *legal sufficiency* of

a proposed pleading and courts properly shy away from offering legal advice to either party, it was problematic here. The issue in this case was not whether Marlow had alleged a legally sufficient cause of action – she had actually done that in the first amended complaint – but whether the court was satisfied by her counsel's *explanation* for the inconsistency between that pleading's allegation of employment termination, and the original complaint's allegation that Marlow was still employed. The court should not have required Marlow's counsel to guess about the specifics of its concerns.

As a practical matter, the trial court disposed of this case in its ruling on the demurrer to the second amended complaint. Because the proposed third amended complaint had been ordered filed at that hearing, the court – in effect – denied leave to amend. That was error.

Because Marlow had pleaded a legally sufficient cause of action when she first amended her complaint to allege employment termination, the court's only concern should have been obtaining an explanation of the discrepancy between that complaint and the earlier one. Thus, the court properly questioned that inconsistency, and ordered a further amendment to address it. But when Marlow's counsel did subsequently offer a plausible explanation for the discrepancy in the second amended complaint, the court was required to accept it. If the court wished to order a further amendment of the complaint for the purpose of correcting the confusion about *when* Marlow's counsel had discovered the original pleading error, it could have properly done so, but that relatively minor inconsistency was not a sufficient basis for disregarding the explanation entirely.

And finally, to the extent Marlow's failure to check the "fired" box on her initial complaint to the DFEH suggested she had failed to exhaust her administrative remedies on that claim, we note that her third amended complaint incorporated an amended claim which remedied that problem. And if the court believed that the mere fact she had not specifically alleged "firing" in that initial DFEH complaint was relevant to the "sham pleading" issue (as indicated in its ruling on the demurrer to the third

amended complaint), it could have requested a further amendment to address *that* issue. Otherwise, Marlow's arguably conflicting claims as to the status of her employment (both in the superior court and DFEH complaints) are merely evidence, and could certainly be used against her should MGE wish to contend, either at trial or by summary judgment, that Marlow's employment had in fact, *not been terminated*.

The judgment is reversed. Marlow is to recover her costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.